MUHAMMAD YUSUF A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
HASAN LAH JCA
ABDUL WAHAB PATAIL JCA
CLEMENT SKINNER JCA
[CRIMINAL APPEAL NO: J-05-14-09]
20 JULY 2011 C

CONSTITUTIONAL LAW: *Attorney General - Power to institute, conduct or discontinue proceedings - Appellant charged under s. 39B Dangerous Drugs Act 1952 - Appellant in midst of leaving country with packages of methamphetamine - Whether appellant should be charged under s. 19 of the Act instead - Federal Constitution, art. 145(3)* D

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking - Packages of methamphetamine found on appellant's body - Whether appellant had knowledge of content of packages - Appellant arrested while travelling to Indonesia - Whether appellant should be charged under s. 19 Dangerous Drugs Act 1952 instead - Section 37(j) Dangerous Drugs Act 1952 - Whether chemist should state weight and amount of homogenised substance taken for analysis* E

EVIDENCE: *Expert evidence - Chemist's analysis of substance - Methamphetamine found in packages - Chemist homogenised substance before analysing it - Whether chemist should state weight and amount taken for analysis - Dangerous Drugs Act 1952, s. 37(j)* F

The appellant was convicted and sentenced for drugs trafficking G
by the High Court. The appellant, an Indonesian, was leaving the country through Stulang Ferry Terminal when his baggage was subjected to a search by the Custom Officer. The appellant was arrested when packages suspected to contain methamphetamine was found in his underwear and socks. The chemist ('PW6') who H
analysed the substance found in the packages had homogenised it first before conducting the test. The said substance was found to be methamphetamine. The trial judge found the appellant guilty of drug trafficking under s. 39B Dangerous Drugs Act 1952 ('DDA'), hence this appeal. The issues raised by the appellant were as I
follows: (i) there was no guilty knowledge or *mens rea* regarding the contents of the packages on the part of the appellant; (ii) the

A appellant should have been charged under s. 19 DDA; and (iii) PW6 did not state the weight and amount of the homogenised substance that was taken from the packages for analysis. It was the appellant's contention that under s. 37(j) DDA where the suspected dangerous drugs that were seized were contained in a
B number of receptacles, it would be sufficient to analyse samples of the contents of not less than 10% of such receptacles.

Held (dismissing the appeal; affirming conviction and sentence)

C **Per Clement Skinner JCA delivering the judgment of the court:**

(1) The appellant contended that he did not have the knowledge of what he was carrying and therefore lacked the *mens rea* for
D the offence. The appellant's claim of lack of knowledge had to be tested against the facts and circumstances surrounding the case. In the present case, the appellant had no reason to conceal the said packages in his underwear and socks if he truly did not know the contents of the packages. He could have kept the packages in his shoulder bag. The appellant's
E conduct of concealing the packages on different parts of his body did not reflect an innocent mind. (para 7)

(2) The appellant was charged with trafficking dangerous drugs in Johor Darul Takzim. He contended that in actual fact he was
F in the process of taking the prohibited packages to Batam, Indonesia and therefore he should be charged under s. 19 DDA. There was no merit in his contention. It was a well accepted fact that a particular set of facts could disclose the commission of more than one offence. Additionally, the
G Attorney-General had the absolute discretion to institute, conduct or discontinue any proceeding for an offence as provided under art. 145(3) of the Federal Constitution. (para 7)

H **(3)** The 10% stated in s. 37(j) DDA referred to the number of receptacles in which the offending drugs were found and not to the weight and amount of the drugs found in or the samples taken from such receptacles. In this instance, PW6 had homogenised the contents of each of the packages before
I taking the sample and he had tested the contents of each package. Thus, the provision of s. 37(j) DDA had no application here. (para 7)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabitkan dan dijatuhkan hukuman oleh Mahkamah Tinggi kerana mengedar dadah. Perayu, seorang warganegara Indonesia, dalam perjalanan meninggalkan negara ini melalui Terminal Feri Stulang apabila bagasinya diperiksa oleh pengawai kastam. Perayu ditangkap apabila pakej-pakej methamphetamine ditemui di seluar dalam dan stokingnya. Ahli kimia ('PW6') telah 'homogenised' bahan yang ditemui dalam pakej-pakej itu sebelum menganalisisnya. Bahan tersebut didapati adalah methamphetamine. Hakim bicara telah mendapati perayu bersalah atas tuduhan mengedar dadah di bawah s. 39B Dadah Berbahaya 1952 ('DDA'), maka rayuan ini. Isu-isu yang dibangkitkan oleh perayu adalah seperti berikut: (i) perayu tidak mempunyai pengetahuan salah atau *mens rea* mengenai kandungan pakej; (ii) perayu sepatutnya didakwa di bawah s. 19 DDA; dan (iii) PW6 tidak menyatakan berat dan jumlah bahan 'homogenised' yang telah diambil dari pakej-pakej itu untuk analisa. Ia adalah hujahan perayu bahawa di bawah s. 37(j) DDA di mana dadah berbahaya yang dirampas terkandung dalam beberapa bekas, ia adalah memadai untuk menganalisis sampel tidak kurang daripada 10% kandungan bekas itu.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)
Oleh Clement Skinner HMR menyampaikan penghakiman mahkamah:

(1) Perayu menegaskan bahawa beliau tidak mempunyai pengetahuan mengenai kandungan pakej-pakej dan oleh itu tidak mempunyai *mens rea* bagi kesalahan itu. Tuntutan perayu perlu diuji dengan fakta dan halkeadaan kes. Dalam kes ini, perayu tidak mempunyai sebab untuk menyembunyikan pakej-pakej itu di seluar dalam dan stokingnya sekiranya beliau tidak mengetahui kandungan pakej itu, malah beliau boleh menyimpan pakej-pakej itu dalam begnya. Kelakuan perayu menyembunyikan pakej-pakej itu pada bahagian-bahagian tubuhnya tidak mencerminkan minda yang tidak bersalah.

(2) Perayu telah dituduh dengan mengedar dadah berbahaya di Johor Darul Takzim. Beliau menegaskan bahawa beliau sebenarnya dalam perjalanan ke Batam, Indonesia sambil membawa pakej-pakej tersebut dan oleh itu, beliau sepatutnya didakwa di bawah s. 19 DDA. Hujahan beliau tidak

mempunyai merit. Ia adalah fakta diterima bahawa satu set fakta boleh mendedahkan lebih daripada satu kesalahan. Selain itu, Peguam Negara mempunyai budi bicara mutlak untuk memulakan, menjalankan atau memberhentikan apa-apa prosiding bagi sesuatu kesalahan sebagaimana yang diperuntukkan di bawah fasal 145(3) Perlembagaan Persekutuan.

(3) Kuantiti 10% yang dinyatakan dalam s. 37(j) DDA merujuk kepada bilangan bekas di mana dadah telah dijumpai dan bukan merujuk kepada berat dan jumlah dadah yang dijumpai di dalamnya atau sampel yang diambil daripada bekas itu. PW6 telah 'homogenised' kandungan setiap pakej sebelum mengambil sampel dan beliau telah menguji kandungan setiap bungkusan. Oleh itu, peruntukan s. 37(j) DDA tidak mempunyai aplikasi dalam kes ini.

Case(s) referred to:
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Lam San [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391 SC ***(refd)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 19, 37(da)(xvi), (j), 39B(1)(a)
Federal Constitution, art. 145(3)

For the appellant - Abraham Mathew; M/s Sucha Singh & Partners
For the respondent - Siti Rafidah Zainuddin DPP; AG's Chambers

[Appeal from High Court, Johor Bahru; Trial No: 45-5-06]

Reported by Melinda Robert

JUDGMENT

Clement Skinner JCA:

[1] Muhammad Yusuf ("the appellant") was convicted by the Johore Bahru High Court of an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") and sentenced to death on 16 January 2009. The charge against him is that he trafficked in 359.13 grams of methamphetamine. The facts leading up to the charge are these.

[2] On 29 June 2005 the appellant, an Indonesian national, was leaving the country through the Stulang Ferry Terminal when he and his baggage was subjected to a search. The appellant was carrying a shoulder bag. The Customs Officer on duty noticed a bulge at the front of the appellant's trousers. The appellant was then subjected to a full body search. The appellant was found to be wearing two pairs of underwear. Between his underwear the appellant was found to have strapped to his body a package wrapped in masking tape. On removing this package the appellant, in answer to a question by the Customs Officer, informed the latter that the package contained material for making jamu. After a caution was administered to him by a Customs Officer the appellant was asked whether he was carrying anything else, to which the appellant said he had another two packages in his stockings. The appellant then took out one package from his left socks and another package from his right socks.

[3] The packages were then seized by the Customs Officer (SP7) and sent for chemical examination which revealed that the three packages contained a total of 359.13 grams of methamphetamine.

[4] At the trial, the learned judge, relying on direct and circumstantial evidence before him, found that the appellant was not only in physical custody of the three packages found on him, but that he also knew that the packages contained drugs. Accordingly the learned judge arrived at a finding of fact that the appellant was in possession of the said drugs. Since the drugs weighed more than 50 grams the learned judge invoked the provisions of s. 37(da)(xvi) DDA to presume that the appellant was trafficking in the drug. Accordingly the learned judge found that the prosecution had established a *prima facie* case against the appellant.

[5] On being called to enter on his defence the appellant gave evidence on oath. Essentially, his defence was that he did not know that the packages contained drugs. It was his story that the packages contained materials for making medicine. They were handed to him in Kuala Lumpur by a person called Rahman who requested the appellant to deliver the packages to a person named Budi in Batam, Indonesia. According to the appellant, he never examined the contents of the packages.

[6] The learned judge did not believe the appellant's story. The learned judge also found that the defence had not raised a reasonable doubt on the prosecution case nor had the appellant rebutted the presumption of trafficking on a balance of probabilities. Accordingly the learned judge found the prosecution had proved the charge against the appellant beyond reasonable doubt and convicted him of the same.

[7] In bringing this appeal the appellant raised three grounds which we now deal with.

(i) No Guilty Knowledge Or Mens Rea Regarding The Contents Of The Packages

The appellant contended that the learned judge had erred when he failed to consider that the proper inference to be drawn from the following facts namely:

(a) the Customs Officers PW3 and PW4 had testified that the appellant had informed them that the material he was carrying was for making jamu;

(b) that it was the appellant who also volunteered the information about the two packages in his socks;

(c) that it was the appellant's evidence that he believed Rahman when the latter told him the packages contained material for making jamu;

was that the appellant did not have knowledge of what he was carrying and therefore lacked the necessary *mens rea* to traffic in the offending drugs.

We do not agree. The appellant's claim of lack of knowledge about the prohibited drugs he was carrying must be tested against the other facts and circumstances revealed in the evidence. The appellant was carrying a shoulder bag on the day in question. If the appellant truly believed the packages he was carrying contained innocent materials then there was no need to conceal the packages in his underwear and socks - he could have put them into the shoulder bag he was carrying, as the learned Judge had correctly pointed out in his judgment. Accordingly the appellants contention that the matters referred to by him in (a), (b) and (c) above gives rise to the inference that he did not know what was

in the packages is untenable as the conduct of the appellant in concealing the packages on different parts of his body does not reflect an innocent mind.

Quite apart from that, the learned judge correctly observed that the appellant had deliberately assumed control of the three packages after they were handed over to him by Rahman in Kuala Lumpur. The packages were in the custody and control of the appellant for some five hours during the bus trip from Kuala Lumpur to Johore Bahru. Even though the appellant said he did not check what was in the packages, the fact remains that he had sufficient time and opportunity to do so if he wanted to. Not only did the appellant not do so, he in fact took steps to conceal the packages which indicates he knew what was in them - otherwise there is no need to conceal them. For the same reason too, if he really believed what Rahman had told him about the contents of the packages, there was no need to conceal them. In the circumstances the appellant having deliberately assumed control over the packages and concealed them, the correct inference to draw is that the appellant knew what was in the packages and so was in *mens rea* possession of them. In *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 the Federal Court approved what was said in *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356 about the correct inference to be drawn about the state of knowledge of the contents of a package which a person deliberately assumes control of. The relevant passage from the judgment of Lord Morris reads:

> If, however, someone deliberately assumes control of some package or container then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

Accordingly the learned judge was correct to find that the appellant had possession with *mens rea* of the drugs in the said packages.

(ii) Appellant Should Have Been Charged Under s. 19 DDA

Referring first to the definition of "export" in s. 2 of the DDA which reads:

> "export", with its grammatical variations and cognate expressions, in relation to Malaysia, means to take or to be taken out of Malaysia by land, air or water, otherwise than in transit;

And then referring to the definition of the word "trafficking" in the same section, it was the appellant's contention that if at all, he should have been charged with an offence of exporting of dangerous drugs under s. 19 DDA which carries a punishment of not more than five years and not less than three years on conviction. Section 19(4) DDA reads:

> (4) any person who shall export any dangerous drug from Malaysia except in pursuance of and in accordance with this Act and the terms and conditions of any authorization or licence granted under this Act in respect of such export shall be guilty of an offence against this Act, and shall be liable on conviction to imprisonment for a term not exceeding five years and not less than three years.

It was contended by the appellant that whereas he was charged with having trafficked in dangerous drugs in the state of Johore Darul Takzim, in actual fact the evidence reveals that he was in the process of taking the three packages containing the prohibited drugs to Batam in Indonesia. Therefore, according to the appellant, he should have been charged with an offence under s. 19 DDA.

We find no merit in this contention. It is well accepted that a particular set of facts may disclose the commission of more than one offence. Under art. 145(3) of the Federal Constitution, the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceeding for an offence, other than proceedings before a Syariah court, a native court or a court-martial. Accordingly it is at the absolute discretion of the Attorney-General for what particular offence under the DDA the appellant is charged with.

(iii) The Wrongful Acceptance Of The Chemist's Evidence

It is the complaint of the appellant that the learned judge erred when he accepted the evidence of the chemist PW6 regarding the tests he had conducted to analyse the contents of the three

packages in arriving at his finding that the substance he examined was methamphetamine having a total weight of 359.13 grams, a proscribed drug under the First Schedule of the DDA. It is the appellant's case that under s. 37(j) of the DDA, where the suspected dangerous drugs that are seized are contained in a number of receptacles, it will be sufficient to analyse samples of the contents of not less than 10% of such receptacles. However, the appellant complains that in this case whilst the Chemist had homogenized the substance found in each of the three packages before analyzing them, he did not state what amount or weight of the homogenized substance he had taken from each package to enable him to undertake his analysis. According to the appellant this was wrong. Further, after the tests, the Chemist had put the remaining balance of the homogenized substance into plastic packets which were not the original packets, but plastic packets supplied by the chemist himself which the Chemist marked. 'E1' 'E2' and 'E3' accompanied with the Laboratory number "Makmal (JB) FOR-1607/05-0".

We find no merit in this submission. It was explained by Abdul Hamid Mohamad JCA (as he was then) in *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551 that the "10%" mentioned in s. 37(j) DDA refers to the number of receptacles in which the offending drugs are found and not to the weight of the drugs found in or the sample taken from such receptacles. What this means is that if drugs are found in say 30 receptacles, then under s. 37(j) it is permissible to analyse samples taken from the contents of not less than 10% of the receptacles before it can be presumed that the contents of all the receptacles consists of or contain drugs of the same nature and description as the sample analysed. However, as pointed out by the learned judge, the section does not lay down what quantity or percentage of the substance found in the 10% of receptacles must be used for analysis - that is a matter which is left to the Chemist who is doing the analysis to determine whether the quantity taken as a sample for analysis is sufficient for the purpose required. In *PP v. Lam San* [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391 the Supreme Court (per Hashim Yeop Sani CJ Malaya) held that in regard to the evidence of a chemist, so long as his evidence is credible, there is no need for the Chemist to show in detail what he did in his laboratory.

A Reverting to the facts here the Chemist (PW6) had homogenized the contents of each of the three packages before taking a sample from each to analyse. Accordingly the contents of all three packages were tested. Accordingly the provisions of s. 37(j) have no application to the facts here. The learned trial judge said in his
B judgment that he accepted the findings of the Chemist that the substance he analysed was methamphetamine weighing 359.13 grams. We see no error in the learned judge's decision. The Chemist had 21 years experience and had all the necessary academic, profession and on the job training to enable him to give
C his opinion on the substance analysed. The Chemist had also weighed the contents of each package and gave the weight before and after analysis. He also described the type of tests done to determine the type of drug found in each package. The Chemist had clearly given credible evidence which was not subjected to
D cross-examination. The learned judge was correct in accepting his evidence.

[8] With regard to the appellant's complaint that after the analysis, the balance of the drugs were put in packets supplied by
E the Chemist, we see nothing in the point taken. What is important is that the prosecution must be able to establish that the drugs or substance that was sent to the Chemist for analysis and the drugs or substance analysed by the Chemist and substance that is produced in court is the same as was seized from the appellant.
F This was not in issue in this case.

[9] In the result, we dismissed the appellants appeal and affirmed the conviction and sentence passed on him by the High Court.

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